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COMPARATIVE STUDY OF THE REAL AND TRANSACTIONAL COSTS INVOLVED IN THE PROCESS OF ACCESS TO JUSTICE ACROSS JURISDICTIONS

Note by the Executive Secretary

1. At its ninth meeting, the Conference of the Parties to the Convention on Biological Diversity, in paragraph 13 (d) of decision IX/12, on access and benefit-sharing, requested the Executive Secretary to commission the development of a comparative study of the real and transactional costs involved in the process of access to justice across jurisdictions.

2. Pursuant to this request, a study was carried out by a consultant and is now being made available herewith for the information of participants in the seventh meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing.

3. The study is reproduced in the form and language in which it was received by the Convention Secretariat. The views expressed therein are those of the authors and do not necessarily represent those of the Secretariat.

* UNEP/CBD/WG-ABS/7/1.

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COMPARATIVE STUDY OF THE REAL AND TRANSACTIONAL COSTS INVOLVED IN THE PROCESS OF ACCESS TO JUSTICE ACROSS JURISDICTIONS

Prepared by Bernard Colas, LL.D.[1]

Executive Summary:

This study was commissioned by the Executive Secretariat in accordance with decision IX/12 paragraph 13 (d) of the Conference of the Parties in order to develop a comparative study of the real and transactional costs involved in the process of access to justice across jurisdictions.

The study aims at assessing and comparing the costs for taking action before an international arbitral tribunal and foreign domestic courts for breach of ABS obligations. The study also provides an assessment of the costs associated with the recognition and execution of arbitral awards and foreign judgments.

More specifically, the study identifies attorney fees as well as other costs and expenses that a plaintiff from a country providing genetic resources would have to incur for an arbitration governed by the Rules of Arbitration of the International Chamber of Commerce and for bringing an action against the user of these genetic resources before the courts of the USA (California), France, Japan and Brazil, where the user is domiciled. The study also covers the cost of procedures related to the recognition and enforcement of arbitral awards and foreign judgments.

February 27, 2008

[1] The author would like to thank Olivier Rukundo, Xavier Mageau and Sabrina Leung for their valuable contribution.

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INTRODUCTION

At its ninth meeting, held in May, in Bonn, Germany, the Conference of the Parties to the Convention on Biological Diversity adopted a calendar of work for the completion of the negotiation of an international regime on access and benefit sharing (ABS) by October 2010 (decision IX/12). The decision provides for three negotiating sessions to be held in April 2009, November 2009 and March 2010, as well as the organization of three expert meetings to inform the negotiating process. Also with a view to supporting the negotiating process, the Conference of the Parties requested the Executive Secretary to commission five distinct studies on a number of technical and legal issues. One of these studies pertains to the:

> *"Development of a comparative study of the real and transactional costs involved in the process of access to justice across jurisdictions"*

The present analysis is undertaken to respond to this specific request.

ACCESS TO JUSTICE

The question of access to justice in a foreign jurisdiction is at the core of the negotiation of an international regime on ABS. The key concern underlying the question of access to justice is that of ensuring that ABS agreements and legislation of the provider country are adhered to.

Enforcement of such obligations may however prove problematic once a genetic resource is taken out of its country of origin and is utilized by a user located in a different jurisdiction. Under the above scenario, the act of seeking redress by a provider of genetic resources in the event of an infringement of an ABS obligation raises a number of technical and practical legal considerations that may prove onerous. As an example, bringing an action in a foreign court can, from a purely procedural standpoint, be quite daunting. The party seeking redress may for instance have to take into account different rules and considerations pertaining to standing, procedural timelines, judgments, and evidentiary standards, just to name a few. These determinants will inevitably have a direct bearing on the cost of access to justice which will in turn inform the party's decision to seek redress or not and the choice of feasible avenues for such action.

BREACH OF ABS OBLIGATIONS

Although the terms of the commissioned study are broad in scope, the situation that is inferred therein can adequately be captured by assessing the costs that may be associated with bringing a claim in an international arbitral tribunal or domestic courts, and with those associated with the execution and recognition of an arbitral decision and foreign judgment in a domestic court where the user is domiciled or where he has assets. Claims may be brought in a foreign country for various purposes, namely for breach of contract or tort. For instance, claims for breach of contract can be brought before a court that has jurisdiction over the dispute. A court will likely have jurisdiction over a dispute arising from a breach of contract if the parties to the contract have agreed to attorn to its jurisdiction or if the defendant is domiciled in the jurisdiction of the court. Tort law can on the other hand be used in the absence of a contract. In that instance, a victim who would suffer damages from the illicit appropriation and use of his genetic resources could use tort law to claim for damages. The victim could for instance take an action based on

specific provision of the source country which stipulates that damages may be sought from a party who is deemed liable for the illicit use of the said resources. Said plaintiff would have to prove that his claimed injury is justly and directly attributable to the misappropriation of the said genetic resources. His or her action may be brought to foreign domestic court where the user is domiciled. Said court would apply tort law of the source country, where the tort occurred (*lex loci delicti*).

It can be noted that the cost for such remedies may not differ substantially whether we are dealing with contract or tort law. As such, and as this study is not intended to be a legal opinion on available recourses, we will, throughout the course of this study, mainly refer to claims related to breach of ABS contractual obligations between a provider and user of genetic resources located in different jurisdictions.

ASSESSING COSTS

At the onset, an important caveat has to be articulated: it is admittedly very difficult to assess the cost of a dispute without knowing the merit of the matter at the heart of the dispute, the exact interests of the parties involved in the dispute as well as the jurisdiction that is seized to resolve the dispute.

It is, however, possible to identify and estimate the main categories of costs that may be incurred in a dispute in order to get an overall idea of the likely cost of litigation. Having said that, it can be noted that legal remedies usually entail a set of costs which can be grouped under the following categories:

- Attorney fees and costs for:
    - Pleadings and defensive motions,
    - Exchange of evidence,
    - Trial and appeal, if any.
- Costs and expenses for:
    - Administrative Costs, including arbitrator's and court costs,
    - Other costs and expenses.

Each of the sections of this study will use these categories to assess costs of legal recourses. We will also, where appropriate, discuss fee arrangement with attorneys and allocation of costs by the arbitral tribunal or the courts.

DISPUTE RESOLUTION

It is not feasible within the scope of a twenty-five page study to cover all jurisdictions where a legal recourse may be exercised. At the Secretariat's suggestion, we have selected to limit the study to jurisdictions that would likely be seized by providers for the enforcement of ABS obligations against users of genetic resources. The selection which is admittedly arbitrary was also made to reflect different dispute settlement procedures from America, Asia and Europe as well as international arbitration.

Although disputes may be resolved through different types of dispute settlement mechanisms, we have limited our study to binding mechanisms like arbitration and court action, as opposed to non-binding mechanisms such as mediation and conciliation.

In said context, the study will cover the followings:

- The first part of the study will consist of an analysis of costs associated with bringing a claim for a breach of an ABS agreement in an international arbitral tribunal and in the domestic courts of the country where the user is domiciled or which has jurisdiction in accordance with notably the provisions of a contract. This analysis will cover four jurisdictions, namely the USA (California), France, Japan and Brazil.

- The second part of the study will consist of an examination of the costs that may be associated with the recognition and execution of an arbitral award and foreign judgments within each of the selected jurisdictions.

ACKNOWLEDGMENTS

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1. INTERNATIONAL LITIGATION

This scenario is easy to imagine:

- A provider in country X enters into an agreement with a foreign company granting it the right to use its genetic resources in exchange for benefits, which are to include the payment of a royalty.
- After having made its first royalty payment, the licensed company neglects or refuses to make other royalty payments.
- The amount at issue is US$ 250,000 and the provider is determined to take appropriate legal recourse to recover unpaid royalties.

The above mentioned scenario raises many questions, such as:

How much will the legal recourse cost? How long will it last? Is it possible to pay the attorney a contingency fee based on success? Can costs incurred by the plaintiff be recovered from the other party?

This section seeks to provide answers to these questions using the 250,000$ claim scenario described above. It compares the recourses potentially available to the plaintiff before an international arbitral tribunal and before the courts of selected jurisdictions.

a. INTERNATIONAL ARBITRATION

To submit a dispute to arbitration, it is necessary that there be a provision in an agreement between the parties specifying that any dispute in relation to the said agreement will be submitted to arbitration. Such a provision is referred to as an arbitration clause (or arbitration agreement). Many ABS agreements contain such an arbitration clause. Alternatively, it is necessary for the parties to a dispute that has already arisen to agree to submit the dispute to arbitration, by means of a "submission agreement". Either way, the consent of the parties is essential.

An arbitration clause (or a submission agreement) will specify the rules and proceedings governing the arbitration. The clause may refer to the arbitration rules of an institution such as the International Court of Arbitration of the International Chamber of Commerce, the London Court of International Arbitration, the Permanent Court of Arbitration, or the American Arbitration Association. Alternatively, it may refer to arbitration rules that are not administered by an arbitral institution, such as the rules of procedure applicable to arbitration that apply at the seat (the legal place) of the arbitration. Such rules may be based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL), or to the UNCITRAL Arbitration Rules themselves. Arbitration that is not formally administered by an arbitral institution is often referred to as *ad hoc* arbitration.

An arbitration that is administered by an arbitral institution is governed by the rules adopted by such institution, subject to changes agreed by the parties, whereas an *ad hoc* arbitration is both

administered by the parties and the arbitrators themselves and governed by the procedural provisions set forth by the parties in their arbitration clause or otherwise agreed by them or determined by the arbitrators. Cost differences between administered and *ad hoc* arbitration arise from the requirement to pay administration fees to an administering institution, though these tend to pale in comparison with the costs associated with the arbitration itself, including lawyers' fees, which arise whether the arbitration is administered or *ad hoc*. Although difficult to assess, *ad hoc* arbitration proceedings may in certain cases be more expensive since there is no control by an institution over the arbitrators' fees and expenses and fewer set rules governing the conduct of proceedings. Time differences may arise, for example, from the need to have recourse to a state court when there is no institution to supervise the arbitral process.

The arbitration clause may also specify – most practitioners recommend that it should – other important elements such as the number of arbitrators, the seat of arbitration and the language of arbitration, determinants that may influence the cost of the arbitration.

For the purpose of this study and for the sake of convenience, we will assess the cost of an arbitration governed by the Rules of Arbitration of the International Chamber of Commerce (ICC Rules). To illustrate, we will add to the above mentioned scenario that the agreement between the provider and user contains the following arbitration clause:

> All disputes arising out of or in connection with the present agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

As we will see, many factors affect the cost and time involved in the conduct of an arbitration and the execution of an arbitral award, including: the number of parties involved, the complexity of the dispute and of the transaction giving rise to arbitration, the seat of arbitration, the number of witnesses and hearings, etc. By far, the most important category of litigation costs is certainly that related to attorney fees.

i. ATTORNEY FEES

Fees charged by attorneys who have arbitration expertise vary greatly from one attorney to the other. Usually, arbitration attorneys will prefer to be paid on an hourly fee basis plus expenses. Said rate may be set in accordance with the number of years of practice, arbitration expertise, city where the attorney practices, the size of the attorney's law firm, and the jurisdiction where he or she practices. For practical considerations, a plaintiff may, for instance, select an attorney located close to his office or in the jurisdiction of the seat of arbitration. Note that the seat will normally determine the mandatory procedural rules that govern the arbitration, and the courts at the seat will have a supervisory jurisdiction over the conduct of the arbitration.

In this context and with a view to assessing the cost of attorney fees in an arbitration governed by the ICC Rules, we will describe the principal tasks that are involved in a typical proceeding. These tasks include (1) preparation of written submissions; (2) intervention in preliminary or interlocutory questions, if any; (3) exchange of evidence; and (4) preparation for and participation in conferences and hearings. The attorney fees related to the recognition and enforcement of an arbitral award in the event that the defendant refuses to comply with the award are covered in the second part of this study.

1. Preparation and Submission of Written Submissions

To commence arbitration under the ICC Rules, the plaintiff's attorney will first have to prepare a request for arbitration. The attorney will then, in due course, prepare and file a reply to the defendant's answer to plaintiff's request, as well as any other written submissions that may be necessary.

Once the arbitral tribunal is constituted, the latter will draw up the Terms of Reference along with a provisional timetable for the conduct of the arbitration. The parties will typically be asked to contribute to the Terms of Reference by providing the arbitral tribunal with a draft summary of their claims and relief sought as well as a list of issues to be determined. The negotiation and signature of the Terms of Reference may require a meeting between the arbitrators and counsel, which would imply additional expenses, or may occur by way of a telephone or video conference with signature by mail or fax.

2. Preliminary/Interlocutory Questions

Following the commencement of the arbitration, a party may decide, for example, to contest the competence of the arbitral tribunal to decide the case or may request that the arbitral tribunal order interim or provisional measures for the duration of the proceedings or make other orders related to the conduct of the arbitration.

Note that under most arbitration rules and laws, it remains at all times possible for a party to request that a court at the seat of arbitration order interim or provisional measures, such as seizure before judgment or measures aimed at obtaining evidence, etc. in accordance with the law of the seat. These recourses clearly increase the delay and costs associated with the arbitration since such recourses typically entail motions, statements, hearings, etc. The plaintiff will have to retain the services of an attorney licensed to make representations before the court of the seat of arbitration, which also gives rise to other fee arrangements and expenses.

3. Exchange of Documentary Evidence

Each party will usually produce the documents that it intends to rely upon in the arbitration, with its written submissions. Nonetheless, a party may file a request for the production of documents from the other party if it is able to demonstrate that the production of the documents is relevant and material to the outcome of the case. A request for production of documents also entails additional expenses and potential delays in the arbitration.

The involvement of witnesses in the arbitration adds to the costs due to the work involved in the preparation of written witness statements and expenses linked to the attendance of the witness at the hearing to give oral evidence as may be required. Some cases also require expert evidence. Expert evidence, if needed, is intended to inform the arbitral tribunal on key issues of a technical or specialized nature involved in the dispute. The use of expert evidence necessarily implies additional costs.

The examination of witnesses will also add to the costs related to the arbitration. Indeed, the attorneys for the parties will have to prepare and attend the examination of the witnesses. Depending on the type of procedure followed, the cross-examination of the witnesses may be allowed or not. Where cross-examination is permitted, it is common for a party that presents a witness to have its attorney meet with and prepare the witness in advance of the hearing.

4. Conferences and Hearing

To ensure the efficiency of the arbitration, it is often desirable to organize a case-management conference or 'procedural conference' to identify the issues in the case and the pre-hearing procedural steps that will be necessary. The plaintiff's attorney will participate in pre-hearing conferences to discuss hearing arrangements. These discussions are usually conducted over the telephone.

Hearings can be expensive and time-consuming. Attorneys must prepare and attend in order to successfully examine and cross-examine the witnesses and to present oral arguments. The hearing may be held at a venue located at the seat of arbitration or, unless otherwise agreed by the parties, at any other location selected by the arbitral tribunal after consulting the parties. In some instances, hearings may be held over the telephone or by video conferencing, or, if agreed, may be replaced altogether by the exchange of written submissions.

Upon completion of the hearing, the attorneys may be asked to provide the arbitral tribunal with additional "post-hearing" written submissions and pleadings. These submissions and pleadings are used by the attorneys to restate the facts as well as the legal grounds that substantiate the claims of their clients.

International arbitral awards are, in principle, final and not subject to appeal under most arbitration rules and national laws. Therefore, the mandate of the attorney often ends once the arbitral award is made. However, if a party against which an award is made refuses to comply with the decision, or if a party asks a court to "annul" the award by reason of serious procedural defect, the plaintiff will need to incur additional fees and expenses to have the arbitral award recognized and enforced in the appropriate jurisdiction. This will be covered in the second part of the study, starting on page 26.

ii. OTHER COSTS AND EXPENSES

Other costs arise in addition to attorney fees, namely costs for the arbitrator(s) and the arbitration institution, as well as other costs tied to the arbitration.

1. Arbitrators' Fees and Administrative Expenses

In international arbitration the parties are generally required to share the costs of arbitrators and those of the arbitral institution, if any, pending the tribunal's final determination as to how those costs should be apportioned.

a. Arbitrators' Fees

In most cases, the arbitrators' fees will be managed by the arbitral institution if the parties have agreed on an administered procedure. The arbitrators' fees will vary as a function of the number of arbitrators that are appointed. The level of these fees may also depend on other factors such as the diligence of the arbitrators, the time spent, the rapidity of the proceedings and the complexity of the dispute., especially where the arbitrators are paid according to an hourly rate. Under the ICC Rules, the arbitrators' fees are based on a tariff that is tied to the amount in dispute (the total amount of all claims and counter-claims) thus discouraging arbitrators from spending unnecessary time on the case. In exceptional circumstances, where the amount in dispute is difficult to determine or the case is particularly complex, the ICC will determine the

arbitrators' fees at its discretion given the circumstances of the case. For a 250,000$ claim, the table below describes the maximum and minimum fees that may be levied by the ICC[2].

The arbitrators' fees do not include the out-of-pocket expenses incurred by the arbitrators for such things as travel, accommodation, meals, courier services and facilities for the hearings, all of which must also be assumed by the parties.

a. ICC Administrative Expenses

In addition to the arbitrators' fees incurred in arbitration, under the ICC Rules the parties are required to pay "administrative expenses" or "administrative costs". These represent the fees charged by the ICC for the administration of an arbitration case. Under the ICC Rules, these fees are fixed on the basis of the scales set out in Appendix III of ICC Rules, or, where the sum in dispute is not stated, at its discretion given the circumstances of the case, provided that the expenses do not exceed the maximum amount of the scale (US$ 88,800). Similar administrative costs or expenses are also charged by other arbitral institutions.

Some cases require an expert to assist the arbitral tribunal. The arbitral tribunal may order such expertise and fix the fees and expenses of the expert(s), which are then passed on to the parties.

b. Payment of Advances Fees and Costs

An arbitration institution often requires the payment of a first advance on its administrative expenses (effectively, a filing fee) payable upon submission of the request for arbitration. Under the ICC Rules, such advance on the administrative expenses is US$ 2,500. This fee is non refundable and is credited to the plaintiff's portion of the advance on costs subsequently payable in the arbitration.

The arbitration institution will, thereafter, generally establish one or more advances on the costs of the arbitration, which may be revised at any stage of the procedure. Such advances are usually payable in equal shares by the parties. If a party fails to pay its share of an advance on costs, the other party may be invited to pay on behalf of the defaulting party in order to ensure that the arbitration continues.

Comparative ICC advance Costs for a 250,000 claim		
US$ 250,000 in Dispute	**One (1) arbitrator**	**Three (3) Arbitrators**
Arbitrator's Fees		
Minimum	US $ 5,745	US $ 5,745
Average	US $ 15,560	US $ 15,560
Maximum	US $ 25,375	US $ 25,375
Advance on Costs (without Arbitrator's expenses)		
Average fees	US $ 15,560 (for 1 arbitrator)	US $ 46,680 (for 3 arbitrors)
Administrative expenses	US $ 7,900	US $ 7,900

[2] Such fees may be calculated online by using the website of the Arbitration Court of the International Chamber of Commerce. Such fees may be comprised between a minimum and maximum.
http://www.iccwbo.org/court/arbitration/id4097/index.html

2. Other Costs and Expenses

In addition to the arbitrators' and the institution's fees and costs, each party is required to pay for its own expenses incurred during the arbitration, which may include:

- Costs related to photocopies or scanning of documents.
- Research of case law required by the attorneys in order to support their submissions and pleadings.
- Document management services. These services may be used to scan and index all the documents that are part of the case, which can facilitate the management of documents and exchanges between the attorneys and the arbitral tribunal.
- Fees for experts involved in the preparation of expert reports, as required, as well as the participation of experts at hearings. The fees charged by an expert are subject to agreement between the expert and the party requiring the expert's services.
- Expenses related to travel, food and accommodation of the witnesses, experts and the attorneys.
- Translation of documents.
- Recording of hearings and transcription by a Court Reporter or by other means.
- Rental of conference rooms and related services for the hearing. The cost of this rental and of the services associated therewith vary depending on the location of hearing, the number and size of rooms that are necessary, etc. Some arbitral institutions have Conference rooms available for rent within their premises.

iii. ALLOCATION OF COSTS

Most arbitration rules and laws provide that the arbitral tribunal has discretion to award costs, and to apportion the costs of the arbitration as between the parties, as it considers appropriate. Such costs may include, in addition to the arbitrators' fees and expenses and the institution's administrative costs, all other costs related to the arbitration reasonably incurred by a party – including a party's attorney fees and the fees of any expert. In allocating such costs as between the parties, the arbitral tribunal will generally take into account the outcome of the arbitration, including the relative "success" of the parties, as well as any unreasonable behavior by a party such as: excessive document requests, excessive legal argument, excessive cross-examination, dilatory tactics, exaggerated claims, failure to comply with procedural orders, unjustified interim applications, unjustified failure to comply with the procedural calendar, etc.

To sum up, although a party may ultimately be awarded costs by the arbitral tribunal, each party is nonetheless required to bear its share of the costs of the arbitration during the course of the arbitral proceeding, including its own attorney and expert fees plus other expenses, as well as a share of the arbitrator and arbitration institution fees and expenses.

Finally, it is noted that there exist several means available to parties so as to limit the costs associated with an arbitration. This can, for example, be done by appointing a single arbitrator instead of three, or by an agreement that the parties retain the services of a common expert if expertise is required. Other ways of limiting costs may be to limit the scope of issues, the

number of witnesses and hearings, etc. For example, in order to assist the parties and arbitrators in this respect, the ICC has issued a report on the techniques to be used for controlling time and costs in arbitration [3].

b. DOMESTIC COURTS OF THE USER COUNTRY

Litigating in domestic courts is governed by domestic rules which are different from one jurisdiction to another. As indicated in the introduction, we have chosen to limit the study to jurisdictions that would likely be seized by providers for the enforcement of ABS obligations against users of genetic resources. The selection, which is admittedly arbitrary, was made with a view to illustrate different dispute settlement procedures in place in America, Asia and Europe.

In this perspective, the following sections will assess attorney fees and costs, including court fees, in USA (California), France, Japan and Brazil for a US$ 250,000 claim made by a plaintiff from a source country. For the purpose of this study and to avoid lengthy discussions on jurisdictional issues which could be the subject of another study, we will assume that the jurisdictions selected below are competent over submitted disputes. Courts are usually competent to hear disputes against defendants that are domiciled in their jurisdictions or in accordance with choice of jurisdiction provisions in a contract.

i. USA (CALIFORNIA)

A plaintiff who intends to take action in California will first seek the assistance of an attorney registered to practice in the said jurisdiction. It bears noting that our analysis solely focuses on procedures that would have to be followed if an action was to be brought to the US District Court, which is the court of first resort of the US Federal court system. As there is at least one US District Court in each State and as the procedures governing the various US District Courts are similar, we have chosen to focus on the procedures in place in California as they are representative of procedures that are followed in many US District Courts. An extensive analysis of procedures in place in each court system would be far beyond the intended scope of the present study. This said, in California to give effect to the attorney-client relationship, the client and attorney generally conclude an agreement letter; as in most States in the USA, a client and an attorney are free to enter into a contract. Although they can agree on a contingency fee based on success, most attorneys involved in business litigation will prefer to be remunerated on the basis of hourly fee plus expenses.

The average fee for an experienced attorney in California is roughly US$ 450 to US$ 500 per hour. The fee for junior attorneys varies between US$ 225 and $US 375 per hour and paralegals are usually paid at a going rate that ranges from US$95 to US $115 per hour. Large firms generally charge higher fees.

[3] http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf

i. Attorney Fees

To assess the cost of attorney fees, which are usually based on the time spent on a given case, we will describe the work involved in a trial which covers (1) the pleadings and defensive motions; (2) disclosure and discovery and (3) conferences, trial and appeal. Although not described below, attorney fees would also include time spent for the preparation and exchange of correspondence, etc. This overview covers mainly first instance. It does not provide complete coverage of costs related to appeals lodged before the Circuit Courts of Appeal.

1. Pleadings and Defensive Motions

First, the plaintiff's attorney will spend time gathering information and documents in order to understand and evaluate the issues at the basis of a given case. This preliminary examination is usually undertaken to determine the merit of the case and to identify the claims for relief as well as the forum in which the complaint should be filed.

In most cases the plaintiff's attorney will select to file the complaint in a State Court. To get back to our initial example, an attorney, for a case valued at US$ 250,000 which involves a foreign plaintiff, will likely choose to file the case in the US District Court which is the court of first resort of the US Federal court system. For the purpose of commercial matters, federal jurisdiction is limited to matters with complete diversity of citizenship, that carry an amount in controversy that exceeds US$ 75,000, or that pertain to a federal question of law. The example provided earlier to canvass our analysis falls within these parameters. It is also worth mentioning that either party can elect to ask for a jury trial.

After gathering all the relevant facts and documents, the plaintiff's attorney will prepare a draft of the complaint and the summons that will, after the client's review, be filed in the US District Court and be served to the defendant. The time required to prepare the complaint depends on the complexity of the case and the availability of all relevant facts.

A judge will normally be assigned to oversee the entire proceedings, including the trial. A magistrate judge will be assigned to supervise all the discovery procedures.

In a US District Court, a non-governmental defendant has 20 days after receipt of the summons and complaint to file an answer or pre-answer motions. Motions can be used to challenge the jurisdiction, choice of forum or the service of process or to seek the dismissal of the case for failure to meet specific conditions. No answer will be due pending a decision on the motion. If the action is not dismissed, the defendant can file an answer and/or a counterclaim.

Depending on the case, there can be various motions filed, many of which will result in a hearing in court.

2. Disclosure and Discovery

Through disclosure and discovery, each party is given access to information on the adversary. This process which is specific to the US and to very few other countries may impose a substantial burden and expense on each party.

The plaintiff's attorney may utilize various discovery methods for the pre-trial disclosure of evidence including: (i) exchange and disclosure of information regarding witnesses, documents

and agreements; (ii) interrogatories (written questions to an adverse party); (iii) written requests for the production or inspection of documents and other evidence, including in electronic format; (iv) depositions (sworn verbal testimony by a witness) and (v) requests for admission (request that an adverse party admit or deny matters of fact). Deposition may also be taken from third parties to the litigation.

Furthermore, besides the plaintiff, who can be compelled by the defendant to be deposed in the US, depositions of witnesses abroad may be requested. This may entail the issuance of letters rogatory (letter requesting permission that a witness be deposed in the foreign jurisdiction) in accordance with the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters for citizens residing in member states. It may also entail the deposition of witness before a competent authority abroad as well the presence of court reporters, and if needed, interpreters and translators.

The time and costs involved in the process depends on many factors, including the number of witnesses deposed and the overall scope of discovery. In large cases, this can involve thousands of pages of documents that are exchanged between parties.

3. Conferences, Trial and Appeal

The plaintiff's attorney will likely take part in meetings with the other parties required by rules of court at which they would exchange information and develop a discovery schedule and thereafter prepare a joint report for the court. Thereafter, the court will require them to attend a scheduling conference to discuss the management of the case and agree on a scheduling order, or in some cases case management orders. The courts mandate that the parties participate in a conference to make a reasonable attempt to resolve their dispute and settle the case before trial. Thereafter if the case is not settled, judges will conduct pre trial conferences on a date near the trial date to come to agreement on the terms of a pre-trial conference order outlining the factual and legal theories of the parties, the list of issues for trial, the pre trial motions and other pre trial matters, the exhibits and witnesses to be used at trial.

As noted before, the trial may take place before a jury or without a jury. This factor will likely impact the overall cost of litigation as a jury trial tends to be more expensive; it notably takes longer to select the member of the jury and to instruct them on the various procedures to be followed. If the parties have not managed to settle during the settlement conferences or through other avenues, they will have a trial during which they will introduce evidence through the production of documents and oral testimony of witnesses including expert testimony. Direct and cross examination may also be conducted by each party's attorney. This process can take as little as a few days or several weeks depending on the case.

Following the trial, post-trial motions including a motion for new trial may be heard. The court will enter a judgment in writing. A party may appeal the judgment to the Circuit Court of Appeal before three judges. Appellate cases may be decided without oral arguments, though Circuit courts do hear oral arguments on the application of one or more parties to the appeal.

Typically in Federal court, from the filing of the case to the end of the trial will take approximately one to two years.

ii. Costs and Expenses

1. Court Fees

There are very few administrative fees. The plaintiff will pay approximately US$ 350 for filing its complaint and summons in addition to process service fees.

2. Other Costs and Expenses

There are other costs that the plaintiff has to bear in US litigation. It bears noting that some costs may be recovered by the prevailing party. Other than court filing fees and service of submissions, the plaintiff has to pay for court reporter fees (approximately US$ 2,000 per deposition) and deposition transcripts, copying expenses, expenses for trial demographics, witness expenses and fees, as well as fees and expenses arising from the use of experts. Other expenses that the plaintiff may have to cover relate to document management expenses which can be significant when the volume of disclosed documents is large.

iii. Recovery of Litigation Expenses

Generally, the prevailing party in a lawsuit will be awarded allowable costs except those related to attorney fees unless the attorney fees are provided for in a contractual relationship between the parties or by statute. These costs usually include, witness fees, transcription costs etc. Attorney fees are generally not recoverable in US litigation but may be allowable as costs when this is authorized by contract or, in unusual circumstances, when it is provided for by a specific statute.

To sum up, in assessing costs of litigating in California and in the US, it is important to take into account the nature and extent of discovery that would be required, motion practices and whether there will be a jury trial as these may impose immense expense and burden on each party.

Attorney fees: US$ 250,000 royalty claim (one contract, four witnesses, one expert, correspondence over a year)	
Pleadings (5 to 10 hours)	US $2,500- US$ 5000
Various motions (0 to 30 hours)	Up to US$ 15,000
Deposition (4 hours per witness) and Written Discovery (30 to 40 hours)	US$ 15,000 to US$ 20,000
Trial (4 days), including preparation (50 to 75 hours)	US$ 25,000 to US$ 37,500
Costs	
Court costs and service	US$ 350
Other costs, including expert fees and costs	US$ 20,000
Average Time	
From initial summons to first instance judgment	Approximately 1 to 2 years
In the event of appeals	Approximately 2 to 5 years

ii. FRANCE

Retaining the services of an attorney registered to practice in France follows the same process as described in other jurisdictions. Clients and attorneys usually negotiate the fee before the attorney accepts to take on the case. Though it is not standard practice, it is recommended that the client enters into a formal written contract with the attorney.

i. Attorney fees

Attorney fees in France do not follow any fixed rule. The fees are evidently contingent on the nature of the case and the estimated time that the attorney will need to spend on the case. Attorney fees are usually based on an hourly rate which fluctuates between 250 to 500 Euros per hour. Pure contingency fees solely based on results are not permitted under French law, although partial contingency fees are allowed.

To evaluate the cost of attorney fees, we will describe the work involved in (1) the preparation and submission of pleadings and other motions; (2) the gathering of evidence and (3) the hearings, trial and appeal. This assessment mainly covers first instance. It does not provide complete coverage of costs related for appeals before the Court of Appeal which would add costs and delays.

1. Pleadings and Motions

As in other jurisdictions, the plaintiff's attorney will gather information and documentation on the case in order to understand and evaluate its merits and identify the competent forum in which the suit may be filed.

The plaintiff would, for a US$ 250,000 royalty claim involving a commercial debtor and creditor, likely file a claim before the *Tribunal de Commerce*, if the agreement does not contain a dispute resolution provision that would expressly confer jurisdiction to another court. If one party is a non-trader, the claim will need to be filed with the civil court (*Tribunal de Grande Instance).* The *Tribunal de Grande Instance* is composed of legally trained judges whereas the *Tribunal de Commerce* is comprised of laymen judges elected by fellow traders or business owners. It bears noting that proceedings in the *Tribunal de commerce* take place in the absence of a professional judge. All appeals go to the Court of Appeal (professional judges).

Prior to filing the claim, the plaintiff's attorney will send, on behalf of his client, a letter of demand that may be delivered by a process server (*huissier de justice*) requesting that the debtor meets its obligations. Thereafter, he will start proceedings by way of a writ of summons (*assignation*) served to the defendant by a process server. The case is recorded in the court docket for trial when the plaintiff delivers to the court clerk a copy of the duly served writ of summons.

After the writ of summons is served, the defendant is granted 15 days to appoint an attorney who must then communicate with the plaintiff's attorney. If the defendant is domiciled abroad, he will be granted a period of two months over the normal timeline usually accorded to file a response. The answer from the defendant usually takes the form of written pleadings which are often accompanied by any other pertinent evidentiary documents. The defendant can issue a counterclaim either directed to the plaintiff or any third party provided that there exists a

sufficient link between the initial claim and the additional claim. The defendant can also file motions demanding the suspension of the proceedings or the dismissal of the claim.

The plaintiff's attorney will respond to said pleadings usually in writing. There can be several exchanges between the parties until the judge decides that the matter is ready for being heard in a trial.

In some cases, especially when the claim is not seriously challengeable, an order *en référé* can be made. It is not *res judica* but it can be obtained in a matter of weeks or even days and is immediately enforceable, even if appealed. The additional two month delay for defendants abroad does not apply in these proceedings.

2. Evidence

Unlike in the US, there are no discovery procedures in France. Each party collects evidence that is likely to support his or her claim and must exchange said evidence with the other party in due course. A party may not be his or her own witness. Documentary evidence may include witness attestations as well as other documents supporting one's claim. Only in very limited circumstances will one party be requested by the court to communicate documents to the other party. This will necessarily impact on the overall cost of litigation. In practice, a witness never appears in Court personnaly.

The most common investigation measure is the use of an expert when factual or technical questions need to be clarified. An expertise can be requested by a party or by the judge. If ordered by the judge, the expertise will be carried out by independent and specialized technicians registered on a list of judicial experts with the *Cour d'Appel*. Obtaining the appointment of an expert is much easier during the pre-trial phase then when the request is made after the beginning of the trial. It is also important to note that the expert reports directly to the court and is also remunerated through the court system. Said expertise will play a significant role in the process of gathering evidence and proving facts since the judge relies upon it.

3. Trial, Judgment and Appeal

Before the *Tribunal de Grande Instance*, a judge will be appointed to oversee the proceedings (*juge de la mise en état*). The judge will first fix a deadline for the exchange of pleadings and evidence. The judge may also set the date of the oral argument should he or she be of the opinion that the case is ready to be decided upon.

The trial will usually last from a few minutes to a few hours.

The first instance judgment may be referred to the *Cour d'Appel* both on factual and legal points, unless the amount at stake is under 4,000 Euros. A decision of the *Cour d'Appel* may be reviewed by challenge in the *Cour de Cassation* only on questions of law. Appeals will evidently add cost and may increase the time required to resolve the dispute. The court may order a provisional enforcement even when the case is appealed.

ii. Other Costs and Expenses

1. Court and Service Costs

The plaintiff will pay negligible court costs at the rates at which they are fixed. For instance, court costs for filing a writ of summons is €14. For servicing a writ of summons, a process server will charge approximately € 100 Euros (Taxable costs, ie per a tariff and which are recoverable).

2. Other Costs

Outside costs of litigation are not included in the attorney fee base. These costs must be directly paid by the client or refunded to the attorney should he choose to advance these costs. These costs usually consist of:

- Outside expenses which may be incurred in the course of proceedings,
- Transportation costs, mail service, courier, copies and sundry communications.
- Translation costs (which can be significant in an international case).

It is worth noting that the plaintiff is usually ordered by the court to make an advance payment to cover the fees for the experts selected by the court, if any.

iii. Recovery of Litigation Expenses

Litigation expenses can essentially be grouped into two categories: court costs and other legal expenses that may be incurred in the course of litigation. In general, the court will award costs and legal expenses to the prevailing party, including fees and expenses linked to the use of a court selected expert, but not attorney fees

To sum up, assessing the costs of litigation in France is simplified by its straight forward proceedings which are typically carried out by an exchange of pleadings and documentary evidence between the parties. Furthermore there is no direct or cross examination of witnesses and hearings are short. This contributes to making litigation in France less expensive, though not any shorter, when compared to practices observed in other jurisdiction such as the US.

Attorney fees: US$ 250,000 royalty claim	
Pleadings and defensive motions (10-30 hours)	€ 5,000 to30,000
Disclosure and Deposition	€ 5,000
Trial	€ 3,000
Costs	
Court costs and service	€ 200
Other costs	€ 10,000 (if it includes judicial expert fees and expenses)
Recovery of litigation expense by the successful party	Court costs and court expert fees and expenses
Average Time	
From initial complaint to first instance judgment	Approximately one to two years (an expert investigation will usually add about one year). One to two months or less for *référé* cases

In the event of appeals	Approximately 2 years (and another 2-4 if appealed to the Supreme Court)

iv. JAPAN

The plaintiff who intends to take action in Japan will seek the assistance of an attorney registered to practice in Japan. Generally, attorneys receive an "up-front fee" when they take on a case and subsequently receive a "success fee" when the case is concluded and their clients are paid or are successful in recovering property.

Attorney fees vary from attorney to attorney. However, some attorneys continue to determine their fees in accordance with the discontinued rules of the Japan Bar Association whose level is contingent on the value and nature of a dispute as follows:

Amount in controversy (yen)	**Up-front fee**	**Success fee**
Less than 3 million	8% (minimum 100,000 yen)	16%
3 million to 30 million	5% + 90,000 yen	10% + 180,000 yen
30 million to 300 million	3% + 690,000 yen	6% + 1,380,000 yen
Over 300 million	2% + 3,690,000 yen	4% + 7,380,000 yen

i. Attorney Fees

Although attorney fees may, in Japan, be less dependent on time spent, it is worth describing work involved for the representation of the plaintiff which includes (1) the preparation and submission of pleadings and other motions; (2) the gathering of evidence and (3) the hearings, trials and appeals. This assessment covers mainly first instance. It does not provide complete coverage of costs related for appeals to the Court of Appeal.

1. Pleadings and Motions

Civil proceedings are initiated when the plaintiff files a complaint with the competent court. Said complaint may be accompanied with copies of evidentiary documents. For a US$ 250,000 royalty claim, District Courts will be competent as they are the courts of first instance for most civil matters.

If the court is satisfied with the complaint, the court will set a date for the first session of oral pleadings (approximately 40 to 50 days after filing date) and serve a copy of the complaint and any evidentiary documents submitted by the plaintiff, with a summons to the defendant.

Two weeks after the set date for the first oral pleading, the defendant is required to submit his answer and both parties must attend the first Oral Pleading Session. The parties may also submit preliminary motions during the first Oral Pleading Session to, for example, request that documents be produced or that the court makes an investigation into some relevant issues.

2. Discovery

Parties to a dispute are responsible for producing documentary evidence and for acquiring witness testimony. The judge is responsible for administering the proceedings including the

selection of both lay witnesses and expert witnesses. The judge will rarely issue orders requiring the production of documents unless he is convinced that such documents are highly relevant to the proceedings. The parties do not exchange witness lists or make request for admissions. Depositions are not permitted as a matter of right. However, a party may make an inquiry to the other party to answer questions in writing, which is similar to interrogatories under discovery rules in the US with some exceptions.

3. Trial and Appeal

Following the first hearing, there will be a court hearing which lasts an average of 10 to 15 minutes and which takes place once a month, for approximately seven to eight months. The parties will be granted an opportunity to submit further submissions to rebut the other party's position or to address specific questions raised by the court. In addition, the judge may hold several other proceedings such as preparatory sessions during which the judge and both parties can discuss the issues at hand for a relatively long time. This proceeding is not open to the public. During theses proceedings, negotiations for a settlement can also take place. A judge may call for a conference at any point in the course of the proceedings to discuss any issue that he may deem important to ensuring that the case is handled in the most expeditious manner.

After the preparatory stage is completed and the issues involved have been sufficiently clarified for the court, the examination and cross-examination of witnesses will follow. After this, each party will file its closing brief. The oral proceedings will close and the court will issue the judgment. The law provides that a judgment should be made in principle within two months from the date of which the examination of the case has been concluded. On average, a first instance judgment is rendered a year and a half after the filing of the complaint.

Judgments and decisions of the District Court can be appealed to the High Court (*Koso*) and then to the Supreme Court, with its permission. The Koso appeal judgment is usually rendered one year after the appeal is registered.

ii. Costs and Expenses

1. Court Fees

The plaintiff has to pay court fees in the form of stamps. Their value is dependent on the value of the claim.

2. Other Costs

In addition to attorney fees, the plaintiff may be requested to pay the following expenses:

- Outside expenses which may be incurred in the course of proceedings,
- Transportation costs, mail service, courier, copies and sundry communications.

iii. Recovery of Litigations Expenses

In Japan, the court can order costs to be paid by the succumbing party to the prevailing party. Said costs assessed by the court usually cover the costs of the stamps that must be attached to the claim and other costs decided upon by the rules of the court. It is important to note that the

recovery of litigation expenses will not cover attorney fees , except in tort cases where 10% of the amount of the damages may be awarded to cover attorney fees.

To sum up, as attorneys often get paid with an "up-front fee" and a "success fee", their cost assessment is less dependent on the work involved as seen in other jurisdictions. It is also worth mentioning that the Japanese justice system is more similar to the French justice system than it is to the US justice system.

Attorney fees: US$ 250,000 royalty claim (24 million yen)	
Up-front fee	US$ 13,500 (1,290,000 yen)
Success fee	US$ 27,000 (2,580,000 yen)
Costs	
Court costs and service	Court Costs
Other costs	US$ 5,000 (estimate)
Recovery of litigation expense by the successful party	Court costs
Average Time	
From initial summons to first instance judgment	Approximately one year and half
In the event of appeals	Approximately one additional year

iii. BRAZIL

As in other jurisdictions, the plaintiff will retain the services of an attorney authorized to practice in one of the states of the Brazilian federation. Although "no win, no fee" arrangements may be admitted under Brazilian law, a Brazilian attorney will usually charge a fee for the initial evaluation of the case. The attorney will then set a fixed amount for attorney fees or agree on an hourly fee with a percentage for the "success fee" to be paid at the end of the dispute. In large law firms, the hourly rate of an attorney is generally around US$ 400 per hour but the actual average rate charged varies between US$ 300 and US$ 400 per hour.

ii. Attorney Fees

To evaluate the cost of attorney fees, we will describe the work involved in (1) the preparation and submission of pleadings and other motions; (2) the gathering of evidence and (3) the hearings, trials and appeals. This assessment covers mainly first instance. It does not provide complete coverage of costs related for appeals before the Court of Appeal.

1. Pleadings and Motions

After gathering all the facts and issues surrounding the dispute, the plaintiff's attorney will prepare and sign the initial petition (complaint) accompanied by a power of attorney signed by the plaintiff and also accompanied by documents supporting the plaintiff's allegations. This petition will be filed with the State Court (where the defendant is domiciled) also known as the "State Justice" which is the trial court competent to hear all cases (civil and commercial litigation, tort, etc.) that does not fall under the Federal Courts jurisdiction (e.g. cases in which the Federal Government is a party to the lawsuit or has an interest).

The court has to admit the claim and then summon the defendant. Following the service of process to the defendant, the defendant has a deadline of 15 days in which he should file (i) an answer (*contestaçao*) with the documents that serve as evidence to the defendant's defense; (ii) an exception (*exceção)* contesting notably the jurisdiction of the judge, or (iii) a counterclaim (*reconvençao*). Thereafter, the plaintiff's attorney will respond in writing to the preliminary objections, if any, and to the answer.

2. Discovery

Unlike the US, there is no pre-trial exchange of evidence under Brazilian civil procedure. All the evidence is presented before the court, at the request of the parties or as determined by the judge. A party may not compel the other party to produce evidence without the participation of the court. Contrary to the US, technical and documentary evidence is more important than witness evidence.

Besides the production of documents at the first phase of the ordinary proceedings, the parties may indicate witnesses and request their deposition at the trial. If the requests involve technical issues, the judge may decide to designate a court-appointed expert. If the court appoints an expert, the parties may appoint, at their expense, assistant experts. All three experts will issue a unanimous report or, in the event that they disagree, each expert will draft his or her own report.

The court has the ultimate authority and discretion to admit and evaluate evidence. The court is in no way bound by the expert report.

3. Trial and Appeal

After all preliminary objections raised in the pleading stage have been resolved, the judge will, after considering representations made by each party's attorney, issue a conclusive opening order (*despacho saneador*) which notably defines the issue at stake, sets the date of the evidentiary hearing and determines what evidence shall be produced at the hearing. The law determines the holding of hearings in an attempt to reach a settlement agreement at the beginning of the procedure, before the judge examines preliminary objections

At the hearing, the judge will admit the deposition of parties and court experts. Evidence and submissions by the parties are mainly done in writing but parties' attorneys may present oral arguments and request substation of written briefs for oral arguments. The judgment will be rendered after the final public hearing or thereafter within one to two months.

Before judgment's publication, a party may present a request for clarification if the judgment is obscure, contradictory or omits some points. After its publication, a party may address to the first instance State Court a request for appellate relief. In practice, a vast majority of first instance judgments are appealed. If procedural conditions are met, the case records will be sent to the State appellate court, known as the Justice Tribunal, for appellate review. Said appeal presided by a collegial of three judges implies written and oral pleadings from each party's attorney.

Decisions of the appellate court may be subject to appeals before the Superior Court of Justice and subsequently to the Supreme Court but only if the decision involves a federal or constitutional issue.

There is no fixed time or term for the termination of proceedings, although there are set time limits for the filing of the answer. The duration of the proceedings depends on the availability of the court. It is not possible to determine the duration of the proceedings since it depends on the legal nature of the action, the type of action and possible appeals filed by the parties. A first instance civil claim may take from 1 to 2 years. With the appeals, a civil claim may take from 2 to 10 years to reach a final decision.

ii. Costs and Expenses

1. Court Fees

The plaintiff has, when filing the initial petition, to pay for the initial court fees which usually amount to set percentage (approximately 2%) of the value claimed in the suit. For a US$ 250,000 royalty claim, the court fee would be US$ 5,000. The plaintiff must also pay costs associated with the servicing of the proceedings and other costs which will depend on the number of defendants and will usually not exceed US$ 500.

Fees for an appeal are usually set in function of the overall value of the case and the nature of the judicial procedure that is initiated.

Before initiating a procedure in Brazil, a foreign citizen or legal entity without assets in Brazil may be required to present a bond (*guarantee*) sufficient to cover the legal expenses and attorney fees of the other party, in the event the foreigner loses the case. For a US$ 250,000 royalty claim, this bond may amount to US$ 30,000. This amount usually includes costs and servicing plus legal fees eventually owed by the party that lost the case and is set at 10 to 20% of the value of the case.

2. Other Costs and Expenses

Outside costs of litigation are not included in the attorney fee base. These costs must be directly paid by the client or refunded to the attorney if he chooses to advance these costs. These costs usually consist of:

- Outside expenses which may be incurred in the course of proceedings,
- Transportation costs, mail service, courier, copies and sundry communications,
- Party's expert fees and expenses,
- Witness fees, including transcription of oral testimony.

iii. Recovery of Litigation Expenses

The judgment will instruct the succumbing party to pay, court costs, travel expenses, witness fees and attorney fees to the prevailing party. Attorney fees are determined by the judge, and usually involve an amount that ranges between a minimum of 10% and a maximum of 20% of the amount of the judgment.

To sum up, the cost of litigation in Brazil is dependent on the fee arrangement made with the attorney which often has a "success fee". With regard to the civil procedure, it is largely based on an exchange of written submissions with no pre-trial exchange of evidence like in the US, the assignment of an independent court selected expert and the intervention of the judge to notably

admit evidence. The level of costs involved in a litigation would be closer to that observed in France, notwithstanding the difference as to the recovery of litigation expenses.

Attorney fees: US$ 250,000 royalty claim	
Pleadings and defensive motions	US$ 20,000
Disclosure and Deposition	US$ 5,000
Trial	US$ 10,000
Costs	
Court costs and service	US$ 2,000 plus a bond of US$ 30,000
Other costs	US$ 5,000
Recovery of litigation expense by the successful party	Court costs, travel expenses, witness fees and attorney fees (10 to 20% of amount of judgment)
Average Time	
From initial summons to first instance judgment	Approximately one and a half year
In the event of appeals	Approximately one additional year

2. ENFORCEMENT OF ARBITRAL AWARDS AND FOREIGN JUDGMENTS

This section covers costs related to procedural issues that are likely to occur in the process of access to justice across jurisdictions.

Once, the plaintiff has obtained a favorable arbitral decision and in the event the defendant would refuse to comply with its terms, the plaintiff will engage in a judicial process to have it recognized and executed by a domestic court of the user country. A similar process would be used to have a court decision from a country enforced in a different country. In such event, said court will consider the court decision which execution is sought as foreign and subject it to rules related to the execution of foreign judgments.

The plaintiff will usually select the court of the jurisdiction where the defendant has assets or is domiciled. The cost of getting an arbitral award or a foreign judgment recognized and executed will notably depend on the jurisdiction of the domestic court. In all events, it will be less expensive than the cost of an arbitration or trial on merit. Usually, arbitral awards and foreign judgments are not reviewed on their merit.

It is important to note that the execution of an arbitral award is facilitated by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). It also bears noting that most countries have implemented its provisions and many have adopted arbitration laws based on the UNICITRAL model law. These rules restrict the scope of review of arbitration in order to narrow it to a set of circumstances. For the purpose of this study, we will assess costs that may be incurred for the recognition and execution of arbitral award in four jurisdictions where the user may be domiciled. The jurisdictions retained for this analysis are USA (California), France, Japan and Brazil, jurisdictions that apply the New York Convention.

No equivalent global convention for the recognition of foreign judgments is yet in force. Consequently, rules for the enforcement of foreign judgments will vary from one country to the other. Length and cost of enforcement proceedings can also be affected by legal uncertainty surrounding the issuance of an enforcement order.

To minimize legal discussions, we will assume that the arbitral award and particularly the foreign judgment both order the payment of an amount as a result of a civil or a commercial claim. Furthermore, the sections below will be limited to providing a description of the work involved in the recognition process and will not replicate a description of fee arrangements and litigation costs found in the first part of the study.

a. USA (CALIFORNIA)

i. EXECUTION OF ARBITRAL AWARDS

In California, a party may petition the District Court to recognize an arbitral award and enter judgment thereon. The US is party to the New York Convention and California has adopted a law based on the UNICITRAL model law. In this context, the plaintiff's attorney will prepare and file,

after the client's review, a notice to confirm the arbitral award before the District Court and to pay the court fees and the service fees. If the defendant files an opposition to the recognition and enforcement of the award, the plaintiff's attorney will prepare and file its response and will take part in the hearing before the judge. The said hearing rarely lasts for more than half a day as there is seldom need for the deposition of witnesses.

Courts may refuse enforcement only on the basis of limited list of defense (e.g. invalid arbitration agreement, lack of opportunity to present one's case) or if enforcement would contravene fundamental notions of public policy. The cost of said procedure will depend on the time required to handle the case and its difficulty. District Court decisions may be appealed which would add to the costs associated with the procedures that are instigated.

ii. EXECUTION OF FOREIGN JUDGMENT

In California, foreign nation money judgments that are final, conclusive and enforceable when rendered are enforced by an action to obtain a domestic judgment, in accordance with the Uniform Foreign Money-Judgments Recognition Act. The court will generally recognize and enforce said foreign judgment unless it falls within the ground for non-recognition as provided for in the Act.

b. FRANCE

i. EXECUTION OF ARBITRAL AWARDS

In France, a party may petition the *Tribunal de Grande Instance* within the jurisdiction where the award was rendered to issue an enforcement order (*exequatur*). The petition must contain an original copy of the award accompanied by the arbitration agreement. The procedure is the same for foreign awards except that the petition for the enforcement order should be made before the *Tribunal de Grande Instance* of Paris, and any foreign award not in the French language must be accompanied by a certified translation. The enforcement order will be granted unless the court has grounds to refuse recognition or enforcement of the arbitral award. The grounds for refusal are limited. For international arbitration, the grounds for refusal of recognition consist of a limited version of those enumerated in the New York Convention to which France is a party. To be operable, the granted enforcement order must be served by a process server to the opposing party. A party may appeal the enforcement order before the Court of Appeal or in the appropriate jurisdiction.

ii. EXECUTION OF FOREIGN JUDGMENT

In France, costs and delays for the recognition of foreign judgment greatly vary between a court decision made in a member State of the European Union and of the European Free Trade Association (which have *prima facie* full faith and credit) and a court decision made in another country.

In the first instance, the application must be submitted to the President of the *Tribunal de Grande Instance* of the district in which the domicile of the judgment debtor is located, or the location of enforcement against debtor's assets. The court shall make its decision without delay; the party against whom enforcement is sought shall not at this stage of the proceedings be informed or be entitled to make any submissions on the application. The application may be refused for limited

reasons only (e.g. decision is contrary to public policy of the State in which it has been issued, when the writ of summons has not been notified or served upon the defendant…). The only recourse is an appeal, which does not stay enforcement.

In the second instance, which will take longer and be more expensive, a party seeking the recognition and enforcement of a foreign judgment must file a petition for an enforcement order (*exequatur*) before the President of the *Tribunal de Grande Instance*. This is like a normal litigation, but the issues are limited. The enforcement order will be granted if the court is satisfied that the tribunal that rendered the decision: i) had jurisdiction; ii) applied the correct law; iii) ensured that the enforcement is not in breach of French international public policy and iv) that the judgment was not obtained by fraud. Decisions of the *Tribunal de Grande Instance* are subject to appeal before the appropriate Court of Appeal.

c. JAPAN

i. EXECUTION OF ARBITRAL AWARDS

Japan is party to the New York Convention and has adopted an arbitration law based on the UNCITRAL Model Law. Therefore, an arbitral award will be enforced after the relevant court has recognized it. The enforcement order will be granted unless the court has grounds to refuse recognition or enforcement of the arbitral award which are almost the same as the ones stipulated in the UNCITRAL Model Law. When the court recognizes the award, the court renders an enforcement decision. The court can, at its discretion, hold an oral argument before issuing its decision.

ii. EXECUTION OF FOREIGN JUDGMENT

Foreign judgments are enforceable in Japan. The legality and conclusiveness of a foreign judgment must be reviewed by a Japanese Court of competent jurisdiction. If the foreign court had proper jurisdiction and the defendant received proper notice of the suit, the judgment will generally be enforced on a reciprocal basis, that is, only in cases where a Japanese judgment is enforceable in the same manner in that foreign country. The foreign judgment must be a final judgment and may not violate Japanese law, nor be contrary to public order and good morals. The Japanese court will not examine the merits of a case that has already been adjudicated in a foreign court.

d. BRAZIL

i. EXECUTION OF ARBITRAL AWARDS

Brazil is also a party to the New York Convention.

A party may petition the Brazilian Superior Tribunal de Justiça (Superior Court of Justice) to recognize the foreign arbitral award, or exceptionnaly to the Supremo Tribunal Federal (Supreme Court) if it affects the Brazilian Constitution (e.g. due process). The petition must contain an original copy of the award accompanied by the arbitration agreement and an official Portuguese translation. The enforcement order will be granted after hearing and exchange of proceedings if contested by the defendant unless the court has grounds to refuse recognition or enforcement of the arbitral award (e.g. incapacity of parties, invalidity of arbitration agreement,

denial of fair hearing, excess of authority or lack of jurisdiction, and procedural irregularities, invalid award, contrary to national public policy).

It may cost about the same price as that of a trial to get an enforcement order and can, depending on the difficulty encountered in reaching a court decision, take between 6 months to 3 years. Appeals would add to the costs and length of the procedures.

ii. EXECUTION OF FOREIGN JUDGMENT

Foreign judgments (final decision of a civil, commercial or penal nature rendered by a judge or court of justice pursuant to due process of law) may be confirmed and enforced in Brazil irrespective of reciprocity or the existence of a specific foreign judgment treaty or convention.

The recognition process is initiated by filing a request for confirmation before the Superior Court of Justice. Upon acceptance of the request, the Superior Court of Justice issues an order directing service on the judgment debtor, who is granted 15 days to respond to the request. If the request is found defective, the Chief justice commands the judgment creditor to amend or supplement it within 10 days except if the other party contests. In case of contestation, the case has to be judged by a special court within the Superior Court of Justice.

If confirmation is opposed, a judgment on the request for confirmation must be rendered by the Supreme Court. Review of the decision concerning the foreign judgment may be sought through an interlocutory appeal before the Supreme Court.

If all of the conditions are fulfilled at the outset, the recognition of a foreign judgment by the Federal Supreme Court can be obtained in little more than one year. The subsequent procedure for the enforcement of the judgment itself remains an open question, with a possible delay of 3 to 4 years.

CONCLUSION

Assessing litigation costs is always a delicate exercise particularly when it involves different jurisdictions. It is also difficult to make broad comparison between countries as cost of litigation is necessarily contingent on the distinct features of each country's judicial system. Nonetheless, some general conclusions can be drawn from the analysis.

The duration of proceedings invariably impacts the cost of litigation. As just one example, we have seen that discovery is a means used in some countries which allows each side to gain access to all documents that are in the possession of the other party. As has been noted, this process which involves locating, reviewing, copying documents is time consuming and expensive particularly when it occurs in large commercial cases. The same is not true in civil law countries such as France, Japan and Brazil where discovery is generally not sanctioned and where proceedings are usually placed under the strict control of the courts.

It nonetheless remains that the cost of litigation will largely depend on how far the parties are willing to go to defend their interests. An aggressive defense can for instance contribute to the multiplication of proceedings which will exponentially increase the cost of litigation. The excessive and aggressive use of motions, where one party seeks a ruling on some aspects of the case before trial, can also unnecessarily delay proceedings thus increasing the overall cost of litigation.

We hope that this brief analysis will assist countries and contribute to the successful completion of the current negotiations for the elaboration of an international ABS regime.
